No. 15991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRIS CALIFORNIA CORPORATION, a California corporation,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, a body corporate and politic, S. WESLEY BREAK, DANIEL MITCHELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as members of and constituting the Board of Supervisors of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California

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BRIEF FOR THE APPELLANT.

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Opinion Below.

The District Court filed no written opinion. Its Findings of Fact and Conclusions of Law [R. 71-72] are not reported.

Jurisdiction.

This is an action by Harsh Corporation, a California corporation, brought on August 29, 1957, in the United States District Court for the Southern District of California, Central Division [R. 3-25], pursuant to Title 28

U. S. C. Section 2201, to secure a declaratory judgment against the County of San Bernardino, California, the five individual members of the Board of Supervisors of said County, its County Auditor, Tax Collector and County Counsel, that property taxes assessed and levied against said corporation with respect to its "possessory interest", as lessee of Government owned land and improvements, by said County and its officers, in the amount of $21,388 for the fiscal year 1957-58, had been properly offset by proper determination by the authorized designee of the Secretary of Defense of the United States of America, acting pursuant to the provisions of Section 408 of the National Housing Act as amended by Public Law 1020, 84th Congress, Second Session, 70 Stat. 1110 [R. 21-23].[1]

The District Court had jurisdiction of this action under 28 U. S. C. Sections 1331 and 2201. The defendants moved to dismiss [R. 3031], upon the ground that the complaint failed to state a claim upon which relief could

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[1]Such provision reads in full as follows:

"Nothing contained in the provisions of Title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of Title VIII: *Provided,* that no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property."

be granted, in that the Court could not grant the ancillary injunctive relief, also prayed for, by reason of inhibition of Title 28 U. S. C. Section 1341. The cause was submitted upon the pleadings, exhibits thereto, and arguments of the parties, written and oral.

On November 7, 1957, the District Court filed its Findings of Fact and Conclusions of Law, and Order Denying Preliminary Injunction, and Order Dismissing Action [R. 71-73]. Within sixty days, and on December 4, 1957, Appellant filed Notice of Appeal from the orders [R. 73].

Jurisdiction is conferred on this Court by Title 28 U. S. C. Sections 1291 and 1292.

Statutes Involved.

The pertinent statutes are printed in the Appendix, *infra.*

Questions Presented.

1. Whether the District Court erred in determining that the plaintiff had a plain, speedy and efficient remedy available in any of the courts of California, and thus was precluded by Title 28 U. S. C. Section 1341 from securing a declaratory judgment that a Federal statute had effected a valid offset against a valid state tax.

2. Whether the District Court erred in denying Appellant a preliminary injunction, preventing the County from collecting from the Appellant a valid tax which, by intervening Federal law, had been legally offset, pending final determination of the nature and extent of such Federal offset.

3. Whether the finding of fact that plaintiff had a plain, speedy and efficient remedy in the courts of the State of California is clearly erroneous, and is wholly unsupported by any evidence before the District Court.

Statement of Points to Be Urged.

On this appeal, Appellant urges and relies upon all of the points originally stated and set out by it [R. 81-85], as the points upon which it intends to rely. For present purposes, they may be briefly stated as follows:

(1) The District Court erred in dismissing Appellant's suit for determination under the Declaratory Judgment Act, of its rights under the Federally determined "deduction" from the California property tax on its "possessory interest" in lesser amount, but validly levied thereon under State statute, except for such "deduction";

(2) The District Court erred in concluding Title 28 U. S. C., Section 1341, prohibited the District Court in granting Appellant the relief sought, and in concluding that Title 28 U. S. C. Section 1341 was applicable to the situation here;

(3) The District Court erred in finding and holding that Appellant had a plain, speedy and efficient remedy in the courts of California as, in fact, there is no remedy available to Appellant under the laws of said State for the enforcement of its rights under said Federally declared and determined "deduction" from a valid California property tax;

(4) The District Court erred in denying Appellant's application for injunction, restraining Appellee County, its agents, officers and employees, from doing any and all acts to enforce the said California property tax or penalty against Appellant, pending determination of the Declaratory Judgment Act rights of Appellant and said County under the aforesaid Federal "deduction";

(5) The District Court erred in denying Appellant's application for permanent injunction, restraining Appellee

County, its agents, officers and employees in doing any and all acts to enforce the said California property tax or penalty against Appellant, to the extent such tax was finally determined by judgment of said Court to be equal to or less than the amount of the aforesaid Federal "deduction", when judicially determined to have been validly made.

Statement of Facts.

Since the District Court acted wholly on Appellee's motion to dismiss, without taking any evidence, all facts set forth in the complaint [R. 3-25] are admitted on this appeal. Summarized these are:

Appellant is lessee of tax-exempt land and improvements owned by the United States, located at Barstow Marine Corps Supply Center, Barstow, California, which constitutes a military housing project for officers, enlisted men and necessary civilian personnel. Both lease and construction of such buildings had been made pursuant to the provisions of the Wherry Act (12 U. S. C. 1748 *et seq.*).

Appellant concedes that, under California law, its leasehold interest in such Government property was taxable as a "possessory interest" since the United States by Section 603 of the National Housing Act (12 U. S. C. 1706b) had expressly consented to levy of state and local taxes thereon.

But, prior to the levy of the taxes here in question, Section 408 of the same Act had been amended by Congress to provide for a *"deduction"*, credit, or offset to such *consented* state or local taxes in

> *"such amount as the Secretary of Defense,* or his designee, *determined to be equal to any payments*

made by the Federal Government to any local taxing or other public agency involved with respect to such property. . . ."

Appellee County assessed Appellant's "possessory interest" for 1957-58 in the amount of $427,760. Taxes thereon were levied against it in the sum of $21,388.

On August 1, 1957, Appellee Tax Collector demanded payment of such amount on or before August 31, under threat of seizure and sale of the government lease, if not paid, and in any event, for an additional 8% penalty ($1,711.04) if not so paid.

Pursuant to the 1956 amendment of the National Housing Act (Sec. 408) Captain A. D. Hunter, as designee of the Secretary of Defense, on August 9, 1957, determined that there was a "deduction", offset, or credit against such tax on account of subsidy payments made by the Federal Government to the Appellee County in the total amount of $27,759 [Ex. C, R. 23] and since such "deduction" exceeded the amount of the tax there was no sum owing at all to the County.

This determination was transmitted to its Board of Supervisors on August 13 [Ex. C, R. 21]. On August 15, Appellant made separate demand upon the Board of Supervisors to comply with Captain Hunter's determination and to cancel its claimed tax liability [Ex. D, R. 24]. However, the County and its officers have at all times refused to cancel such tax liability or to give any effect whatsoever to Captain Hunter's determination as to the appropriate "deduction" therefrom.

Appellant filed this suit for Declaratory Judgment as to its rights in the premises on August 29, 1957. As permitted under 28 U. S. C., Sec. 2201, it sought ancillary

injunctive relief against the County and its officers pending such declaratory judgment and subsequently for enforcement of such judgment.

On October 4, 1957, Appellees, pursuant to Rule (12) (6) of the Federal Rules of Civil Procedure, moved to dismiss this action for lack of jurisdiction in the District Court. The Honorable William Byrne, Judge of the District Court, granted such motion on November 7, 1957. On the same day he entered his findings of fact and conclusions of law [R. 71][2] as well as his judgment dismissing this action [R. 71-72].

On December 4, 1957, Appellant appealed to this court from said judgment of dismissal and the whole thereof [R. 74].

Summary of Argument.

Under California law, Appellant's leasehold was taxable as a "possessory interest", since the United States, by Section 603 of the National Housing Act, had expressly consented to levy of state and local taxes on its lessee's interest.

Prior to the levy of 1957-58 taxes, Section 408 of the National Housing Act had been amended to provide for a "deduction" from such local taxes in "such amount as the Secretary of Defense, or his designee, determined to be equal to any payments made by the Federal Government to any local taxing or other public agency involved with respect to such property. . . ."

Appellee County levied taxes against Appellant in the amount of $21,388.00. Appellee Tax Collector, on August

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[2]As indicated by the Conclusions of Law entered by the District Court [R. 71] its dismissal was wholly predicated upon the claimed limitation on exercise of basic jurisdiction of the District Court by 28 U. S. C. A. §1341 (Johnson Act).

1, 1957, demanded payment of this amount on or before August 31, 1957, under threat of seizure and sale of the Government lease and, in any event payment of a penalty of $1,711.04 if taxes were not paid prior to that date.

Pursuant to the aforesaid Federal statute, Captain A. D. Hunter, U.S.N., designee of the Secretary of Defense, on August 9, 1957, determined that there was a "deduction" on account of subsidy payments made by the Government to the County of $27,759.00 and since said "deduction" exceeded the amount of the tax, there was no sum owing to the County.

Captain Hunter's determination was transmitted to the County Board of Supervisors on August 13, 1957. On August 15, 1957, Appellant made separate demand upon the Board to comply.

No California statute authorizes any offset to be made against a valid County tax. The Federal statute provides no administrative implementation. By state statute, the Tax Collector is required to receive the tax in lawful money of the United States only, together with an 8% penalty, amounting to $1,711.04, if the tax was not so paid before August 31, 1957.

The Tax Collector is empowered by state law, on non-payment of a tax to enforce the same by seizure and sale of Appellant's leasehold estate, or by suit for recovery of judgment for the amount of the tax, penalties and costs, against Appellant.

The California statutes do not include any general consent provision for suit against the state, or its subordinate entities, including counties. Consent statutes are specific in character, and do not permit the setting up of an offset to a state tax.

The State Declaratory Relief Act is a remedial statute limited to where direct suit is permitted. It affords no remedy to Appellant here.

The State Tax Protest Statute, permits suit for recovery of taxes only when the tax is "void", in whole or in part. There is no claim here that the tax is void.

The State Tax Refund Statute permits suit only if the tax is "illegally" collected. Since the duty imposed on the Tax Collector is to collect the entire amount of the valid tax, here admitted, were Appellant to pay the tax, this procedure would not be available.

Mandamus is unavailable in the State Courts because there is no duty upon the Tax Collector, under state law, to give effect to the Federal deduction. Certiorari or Writ of Review is not available, because no action of a judicial character by an inferior tribunal is involved.

Injunction is not available in California to the wronged taxpayer. Further, it is not available to Appellant because, until the Federal offset has been determined, there is no basis for an injunction under state law against the valid collection of a valid state tax. There is no provision for the determination of the supervening Federally authorized deduction, since to set the same up in absence of state consent thereto, is to sue the sovereign without its consent.

The only remedy, therefore, available to Appellant is to secure in the District Court, determination of the validity of the Federal deduction and, predicated upon such declaratory judgment, restrain, in the Federal Court, any attempt to collect the state tax, offset by such Federal deduction.

I.

District Court Clearly Has Jurisdiction of Instant Action, as One for Declaratory Judgment Under 28 U. S. C. 2201, Since It Arose Under Federal Statute, Granting Offset to State Tax, and No Attempt Was Made to Enjoin Collection of a State Tax, but to Enforce Federal Offset Against the Same.

Plaintiff does not now, and never has, claimed any *invalidity per se* in the tax levied on its "possessory interest". Its non-liability for payment of such tax does not arise out of *illegality* or *error* in such tax, but is the result of a countervailing "deduction", offset, or credit first created by Congress by the 1956 amendment of the National Housing Act, quoted in full, footnote 1 (*supra* p. 2).

The purpose of this offset, as clearly stated in the House Committee Report[3] thereon, was to prevent "windfall profits" accruing to local entities by reason of receiving *both* a congressional subsidy *and* local taxes from the leasehold interest in the Government property in question.

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[3]The House Committee Report stated the purpose for the "deduction" as follows:

> "As tax payments for a project normally have an ultimate effect on the rentals paid by military and civilian personnel at the military installations, *it is important* that *no payments be made to communities which would constitute a windfall over and above normal taxes.* Consequently, it is very important to assure that the project does *not duplicate* payments for services furnished to it. *This duplication would be avoided under the provision in the bill for deductions* from tax payments, as explained above."

A. This Action Clearly "Arises Under . . . Laws . . . of the United States."

Basic jurisdiction here, as a case arising "under the . . . laws . . . of the United States" (28 U. S. C. 1313) is clearly established. Apparently this was recognized by the District Court.[4]

In *King County, Washington v. Seattle School District, No. 1,* 263 U. S. 261 (1923), the Supreme Court had before it a Federal statute, providing that certain moneys derived from use of national forest reserves in the State of Washington were to be paid, as a subsidy, to that State to be used for "public roads" and "public schools", "and not otherwise". By state statute, the Federal subsidy funds had been distributed in such manner that the school district in question did not receive one-half. The school district brought an action in the District Court against the County Commissioners of King County for an accounting to it of amounts sufficient to make up one-half of the subsidy.

On the point of *jurisdiction* the Supreme Court said at pages 363-4:

> "Section 24 of the Judicial Code provides that the district courts shall have original jurisdiction where the matter in controversy arises under the laws of the United States. *In this case the right and title set up by the appellee depends upon the act of Congress.* There is involved the question whether that

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[4]Reference to the District Courts Conclusion [R. 71] discloses that it rested its decision *solely* on the claimed prohibition in 28 U. S. C. 1341.

act permits the money so received by the county to be expended by the county commissioners as directed by state legislation, or requires an equal distribution annually for the benefit of public schools and public roads of the county. . . . *The District Court had jurisdiction.*" (Our italics.)

In *Peyton v. Railway Express Agency,* 316 U. S. 350, 62 S. Ct. 1171 (1942), an action was commenced against the Express Agency for $750,000 damage occasioned by loss of property sent by express. Objection to jurisdiction was interposed upon the ground that by limitation in the carrier's contract, its liability was $50, below jurisdictional requirement. For lack of the jurisdictional amount, the District Court dismissed. The Supreme Court held the liability itself involved an interpretation of the Federal "Carmack Amendment", therefore, the District Court had jurisdiction, saying at page 353:

". . . Petitioner's pleading, which we have summarized, satisfied this requirement *since it adequately discloses a present controversy, dependent for its outcome upon the construction of a Federal Statute.*" (Our italics.)

In *First National Bank of Canton v. Williams,* 252 U. S. 504 (1920), the bill alleged that Williams, Comptroller of Currency, had maliciously persecuted plaintiff bank. The Supreme Court said at page 512:

"What constitutes a cause arising *'under'* the laws of the United States has been often pointed out by this court. *One does so arise where an appropriate statement by the plaintiff,* unaided by any anticipation or avoidance of defenses, *discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of an*

act of Congress. . . . Clearly, the plaintiff's bill discloses a case wherein its right to recover turns on the construction and application of the National Banking Law; . . ." (Our italics.)

In *All-American Aircraft v. Village of Cedarhurst,* 201 F. 2d 273 (C. C. A. 2d, 1953), the District Court had restrained enforcement of a city ordinance as conflicting with Federal legislation regulating aircraft. Appeal was taken upon the ground that the ordinance was a valid exercise of State police power and, therefore, the District Court lacked jurisdiction. The Circuit Court of Appeals said at page 277:

"*. . . there can be no doubt,* as none is suggested, *of the meaning of the ordinance and its direct clash with the Federal regulations as interpreted by plaintiffs. There is therefore no occasion for postponement here for possible state action. The general authority of the court below is clear under 28 U. S. C. A. Secs. 1331 and 1337.*" (Our italics.)

In *City of Dallas v. Higgenbotham-Bailey-Logan Co.,* 37 F. 2d 513 (C. C. A. 5th, 1930), plaintiff sought injunction against the city from enforcing personal property taxes. The assessor had learned, after plaintiff had returned its property for assessment purposes, that it owned two million dollars in Liberty Bonds and Treasury Notes. He assessed the same as cash, contending that the purchase had been for the purpose of evading local taxes. The Circuit Court of Appeals stated the objections urged to jurisdiction, *which it rejected,* at page 514:

"The city excepted to the bill on the ground that there was no Federal question involved, . . .

"As to the first of these propositions, it is sufficient to say that, *if the plaintiff had acquired the*

securities in such manner as to be free from taxation, and what was being done by the city amounted to an attempt to tax them by this indirect method, the same amounted to a clear violation of the law . . . and the lower court, therefore, had jurisdiction to construe and apply this Federal statute, under section 24(1) of the Judicial Code." (Our italics.)

B. No Administrative Provision for Effectual Federal "Deduction" or Offset Exists Under State or Federal Statute.

No provision for giving administrative effect to the federally created "deduction", or offset, is contained in Section 408 of the National Housing Act as amended (*supra,* p. 2, f. 1) or elsewhere by Federal statute. By state statute (Cal. Rev. & T. C., Secs. 2501, 2502), county taxes must be paid only "in legal tender or in money receivable in payment of taxes by the United States" unless the Board of Supervisors by a four-fifths vote authorizes use of county warrants of the same fiscal year (Cal. Rev. & T. C. Sec. 2511).

There is thus no *express* statute implementing the Federal "deduction" or offset here.

It has long been the law of California that, in a tax proceeding, there is no right of offset or counter-claim against an otherwise valid State Tax, *"unless expressly so authorized by statute".*[5]

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[5]*Himmelman v. Spanagle,* 39 Cal. 389, 393 (1870);
Prescott v. McNamara, 73 Cal. 236 (1887).
To same effect in other states see:
Cooley on Taxation, Vol. 1, p. 90, F. N. 17;
Western Town Lot Co. v. Lane, 7 S. D. 599, 65 N. W. 17;
McVeigh v. Lanier, 8 S. W. 141 (Ark. 1888);
Morgan v. Pueblo & Arkansas Valley Rd. Co., 6 Colo. 478 (1883);
Carterville Water Works Co. v. Mayor, etc. Cartersville, 16 S. E. 70 (Ga. 1892);
Amy v. Shelvy County Tax District, 114 U. S. 387 (1885).

C. Under California Cases, to Assert Judicially an Offset Against a Valid Tax, in Absence of Express Statutory Provision, Would Be to Sue the State Without Its Consent.

Furthermore, under California law, the right to raise *judicially* by counter claims or cross-complaint an offset to a valid tax is itself a suit against the Sovereign. This, under California cases, may *not* be done unless *expressly* authorized by a consent statute. *There is no California consent statute applicable here.*

This was squarely held by this Court on similar facts in *Sunset Oil Co. v. State of California,* 87 F. 2d 972 (1937). This Court said at pages 974-75:

> "The Supreme Court of California in People v. Miles, 56 Cal. 401, stated the general rule with reference to the allowance of set-off against the state, as follows: 'It would seem to be hardly necessary to cite authorities to the proposition, that a *State cannot be sued in her own State, directly or indirectly, as by setting up a counter-claim or set-off;* nor can any judgment be recovered against the State, *except when the same is permitted by express statute'.*
>
> "The first question for consideration is whether or not the state has authorized a suit to be brought against it to recover a tax *illegally* and *erroneously collected. The burden lies upon the parties suing the state to show that such a suit has been authorized by the state.* The appellant points to section 3669, subd. 3, of the Political Code, . . . *This section* does not purport to authorize a suit against the state to recover taxes erroneously or illegally collected, but *provides an administrative method for securing a set-off.* . . . The rule is that *authority to sue must be expressly given. It is therefore not to be inferred from a mere recognition of substantive right to be established by administrative procedure that authority has been given to sue.* . . .

> "It follows from what has been said, that the *state has not authorized a suit to recover* for taxes *erroneously or illegally collected* by its *officers otherwise than by the action of its administrative officers.*" (Our italics.)

For this reason, therefore, the action below was brought in the District Court to secure a declaratory judgment under the provisions of 28 U. S. C. 2201, as to the rights of the Appellant and the Appellees, arising out of the Federal offset statute in question. That such remedy includes *all* taxes, other than "Federal taxes", was held and applied by the United States Supreme Court in *Hillsborough Township v. Cromwell,* 326 U. S. 620, 622-8 (1946).[6]

D. District Court Misunderstood Nature of Suit Before It, and Therefore Erred in Dismissing Same Under Misconception That Its Jurisdiction Was Prohibited by Johnson Act.

The District Court's Findings of Fact and Conclusions of Law [R. 71-72] disclose, we submit, an entire misunderstanding by the District Court, both as to the nature of the suit before it and of its jurisdiction in connection therewith.

The findings[7] describe this proceeding as one "to enjoin, suspend and restrain the collection of taxes" by the

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[6]In this case the Court sustained a decision by the District Court in a declaratory judgment proceeding holding that a New Jersey property assessment for the years 1940 and 1941 was "null and void", and holding that federal jurisdiction so to do existed because of the "uncertainty surrounding the adequacy of the state remedy."

[7]Thus, paragraph I of the Findings of Fact reads as follows:

> "This is a proceeding by a California corporation to enjoin, suspend and restrain the collection of taxes by the County of San Bernardino, through its officers, under the laws of California, and for a declaratory judgment that said taxes are not due or owing to said County by plaintiff."

defendant county, *and* for "a declaratory judgment that said taxes are not due or owing to said county by plaintiff".

That, the District Court *erroneously* considered the *ancillary* relief sought, to be the *gist* of the action, appears clearly by reference to the first prayer of the complaint [R. 14-15][8] which asked the court for declaratory judgment that the "deduction" in the sum of $27,759, as made by Captain Hunter, was a "valid and complete offset and deduction".

With due respect to the District Judge, it seems clear that he *confused* the declaratory judgment proceeding, so instituted, with the more common action brought to restrain the "levy or collection" of a state tax on grounds going to its *basic invalidity* under Federal statute or Constitution.

Of course, basic jurisdiction of the District Court in cases of the latter category is limited by the Johnson Act (28 U. S. C. 1341) to situations where the plaintiff did *not* have "a *plain, speedy* and *efficient* remedy" in the *state* courts. That the District Court *erroneously*

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[8]So far as pertinent here, the first and basic prayer of the complaint reads as follows:

> *"That this Court declare that the offset and deduction in the sum of $27,759.00, as determined,* pursuant to Section 408 of the National Housing Act of 1955, as amended, *by the designee of the Secretary of Defense* to have been expended by the United States of America with respect to such property *is a valid and complete offset and deduction from 1957-58 taxes* claimed by defendant County to be owing to it from plaintiff *in the sum of $21,388.00* on account of plaintiff's 'possessory interest and all other right, title and interest' arising out of plaintiff's lease from the United States of America of certain lands and buildings, owned by the United States, *and that, therefore, there is no sum at all due, owing or unpaid to defendant County* from plaintiff on account of said 1957-58 taxes." (Our italics.)

construed the instant action as one to *enjoin* state taxes also appears from its second finding, which recites that appellant had "a plain, speedy and efficient remedy in the State of California", and from its conclusion based thereon, which categorically predicated its dismissal of this proceeding *"because of . . . the prescription of 28 U. S. C. 1341.*[9]

As a matter of fact, Section 1341 is *not* applicable *directly* to a proceeding brought for declaratory judgment. This was held by the Supreme Court in *Hillsborough Township v. Cromwell,* 326 U. S. 620 (1946), in pointing that the Federal Courts—*only as a matter of "policy"*—, have used the same as a yardstick in exercising their jurisdiction under the declaratory judgment act.

See also:

Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293, 300-301 (1943).

But jurisdiction is established here, in any event, as held by the Supreme Court in the *Hillsborough Case, supra, if there is "uncertainty surrounding the adequacy of the state remedy".*

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[9]In its entirety, the conclusions of law, as rendered by the District Court, read as follows:

"Because of plaintiff's plain, speedy and efficient remedy in the Counts (*Sic.*) of the State of California and the prescription of 28 U. S. C. 1341, this court may not grant plaintiff the injunctive relief it seeks in this matter."

E. "Uncertainty" of Any Relief in State Courts Demonstrated as to This Very Tax in Action Taken by State Superior Court, When County Sought to Enforce the Same by Suit.

Before considering specific cases showing "uncertainty" as to any relief being available to Appellant in the State Courts, we wish to point out two basic considerations:

(1) It was never claimed by Appellee that there was any case precedent in California demonstrating existence of State remedy for Appellant under the specific circumstances of this case.

(2) Since this suit was instituted in the District Court, Appellee County sued Appellant in the California Courts for the recovery of the entire tax here in question *without any consideration of the Federally determined "deduction" therefrom.* The United States, acting through its Department of Justice and local United States Attorney, sought to intervene and set up the Federal "deduction", offset or credit. Likewise Appellant attempted, by cross-complaint, to secure injunctive relief against enforcement of the tax based on its right thereto under the Federal "deduction" alleged in the Government complaint in intervention.

On motion of Appellee, the Superior Court of California in and for the County of San Bernardino denied the Government *any right of intervention* and *struck* Appellant's *cross-complaint for injunction, without leave to amend.*

The United States is now prosecuting an appeal therefrom in the State courts. By agreement between the parties, no further action will be taken by the County thereon, pending the determination of the Federal right of intervention by the state appellate court.

II.

California Statute and Case Law Provide No Plain, Speedy and Efficient Remedy.

In attacking the judgment of dismissal below, *without any express authority in support thereof,* it is evident that for us affirmatively to show either "uncertainty" in the State remedy, or absence of State remedy, requires longer consideration than otherwise would be the case. It is always more difficult to prove the negative than the positive.

Turning therefore to a general survey of California statutory provisions which might possibly, but actually do not, afford a remedy available to Appellant under the circumstances of this case, we believe that there are only four applicable remedies which could conceivably have existed in California, to wit:

a. Declaratory relief in the State Courts;

b. Payment of the tax without consideration of the offset, under protest, and suit for recovery thereof;

c. Payment of the claimed tax, without deduction of offset, filing of claim for refund thereof, and suit against the County on denial of the claim;

d. Relief in some manner by *mandamus, certiorari* or *injunction.*

A. Declaratory Relief Does Not Lie on Facts of This Case in the California Courts.

The only authority in California for institution of declaratory relief action in the state courts is found in the Code of Civil Procedure, Section 1060 reading so far as pertinent as follows:

> "Any person interested under a *deed, will* or other *written instrument,* or under a *contract,* or who desires a *declaration of his rights* or duties with respect

> to another, or in respect to, in, over or upon *property*, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the permises, including a determination of any question of construction or validity arising under such instrument or contract." (Our italics.)

It is evident that the remedy in California is thus limited to construction of a *"deed", a "will," "written instrument", "contract",* or *"property" rights* particularly in connection with a "water course".

While it is true that the word "person" has been held to include a political subdivision, California courts have held that Section 1060 is *remedial* only. Relief thereunder *cannot* be granted if an "impairment of sovereign powers would exist".

> *Hoyt v. Board of Civil Service Commissioners,* 21 Cal. 2d 399, 402 (1942);
>
> *People v. Superior Court,* 161 A. C. A. 48, 51 (1958).

For similar holding under Code of Civil Procedure, Section 1050, authorizing an action to determine "an adverse claim", see,

> *Whittaker v. County of Tuolumne,* 96 Cal. 100, 101 (1892).

When as here, the only purpose for seeking declaratory relief under the state statute would be to set up the validity of an offset to an admittedly valid state tax, in the absence of express statutory provision to sue the state therein, it is clear that the state declaratory relief procedure would not be available.

B. Cancellation of Tax Even Though Improper, Can Not Be Enforced by Private Party Under California Statute.

The *only* provision authorizing the cancellation of a property tax proceeding, once begun, is found in Revenue and Taxation Code, sections 4986-4994. So far as pertinent here the basic section 4986 reads as follows:

> "All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled . . . if it was levied or charged:
>
> a. More than once.
>
> b. Erroneously or illegally.
>
> c. On a portion of an assessment in excess of the cash value of the property by reason of the assessor's clerical error.
>
> d. On improvements when the improvements did not exist on the lien date."

Only one of the four grounds is even remotely applicable, to wit: "erroneously or illegally". In this case, there is no question that the assessment made by the County Assessor *as* of the first Monday of March, 1957, was *not erroneous* or *illegal.* As an unsecured assessment, the tax rate was fixed by the California Constitution (Art. XIII, Sec. 9a) at the *secured* property rate of the preceding year in the same taxing districts.

Both the assessment and *amount of* tax had, therefore, become *final* under state law, and the tax was *due* and *payable, before* Captain Hunter, acting as designee of the Secretary of Defense, *made* his determination on August 9, 1957, as to an offset, credit, or "deduction" in an amount *exceeding the entire tax.* On the face of the statute, cancellation was not authorized here by *administrative* means.

Moreover, since the decision of the California Superior Court in *Security First National Bank v. Supervisors,* 35 Cal. 2d 323, 327 (1950), it has been held that the remedy under these sections *can not be enforced in the courts by a private taxpayer by mandate to compel a cancellation, even if one were authorized by the statute.*

The California statute and case law is thus *devoid* of any remedy, *administrative* or *judicial,* authorizing *correction* of the tax proceedings here in order to give effect to the Federally created offset, credit, or "deduction".

C. On Facts of This Case, Appellant Had No Right of Payment Under Protest Followed by Suit for Recovery.

A very common procedure followed as to property taxes in California, as in other states, is to pay the same under protest, coupled with immediate suit for recovery of the protested taxes. Procedure in this regard is contained in Revenue and Taxation Code sections 5136-5143. Unlike the cancellation provisions, if the subject matter falls *within* the permitted protest, consent for suit is given (Secs. 5138-5142). But, under this statutory procedure, the protest and suit are limited to an "assessment" which is *"void* in whole or in part".

Assuming that the word "assessment" is broad enough to include a "tax", it is evident here, since *both* the "assessment", in its technical meaning and the "tax" were assessed or levied respectively (and as to the "tax" due and payable) *prior* to Captain Hunter's determination, *it can hardly be argued that it was "void" in whole or part.*

D. California Tax Refund Claim Procedure, Followed by Tax Recovery Suit, Not Available to Appellant.

The remaining statutory remedy to which Appellant *might,* but does not have recourse, is by paying the tax voluntarily, filing a verified claim for refund within three years after payment, and if such be denied, bring suit for its recovery (R. & T. C. 5096-5097).

The basic section (5096) sets forth the only grounds upon which such a refund may be made by the Board of Supervisors (or on failure, compelled by subsequent suit) is as follows:

(a) "Paid more than once"

(b) "Erroneously or illegally collected"

(c) "Paid on an assessment in excess of the cash value of the property, by reason of the assessor's clerical error"

(d) "Paid on the assessment of the improvements, when the improvements did not exist on the lien date."

The second is the *only* ground even remotely available to Appellant. The question therefore arises, would the collection *now* of the tax from Appellant be *"erroneous* or *illegal"* under the above statute?

It is evident here that had Appellant paid the tax *prior* to Captain Hunter's determination, its collection could not have been either "erroneous or illegal" *since the Federal offset did not come into existence until Captain Hunter's determination had been made.*

Thus, in *Hammond-Knowlton v. Hartford, Conn. Trust Co.,* 89 F. 2d 175 (C. C. A. 2d, 1932), the Court said at pages 177-178:

> "This section therefore refers to the crediting of a Federal tax *illegally collected, not to the crediting*

ON *a federal tax of a payment made or to be made to a state.*

"The credit for state taxes claimed in the return could *not* be allowed by the Commissioner *until payment thereof was made and the requisite proof submitted to him. . . . At that time, the Appellee had not submitted the documents and evidence required by the regulation.*" (Capitals indicate emphasis by court; italics ours.)

In *Roles v. Earle,* 195 F. 2d 346 (1942), this Court expressly relied upon the *Hammond-Knowlton Case* on similar facts.

Even more apt is *State v. Newton,* 300 P. 2d 527 (Colo. 1956). The Federal Estate Tax on the Estate of Newton, a Colorado resident, basically was $19,529.21, against which there was applicable credit up to 80% on account of inheritance taxes, if paid to other states. Payments made to several states totaled $6,092.18 less than such maximum.

In order to take advantage of such situations, the Colorado Legislature had adopted a so-called "gap tax", which levied on each Colorado estate an additional amount "equal to the difference between the maximum 80% credit . . . and the total credit applicable . . . for actual state death taxes thus paid". Newton's Estate thereupon paid to the State of Colorado, on account of the "gap tax", the sum of $6,092.18.

Subsequently, Congress retroactively adopted an amendment which, as applicable to Newton's estate, reduced its Federal tax liability and the ordinary state taxes, excluding the "gap tax", were sufficient in amount to use up the 80% maximum credit.

Alleging these facts, the administratrix filed her claim with the State of Colorado, alleging that the "gap tax" had been "erroneously paid" and sought its recovery. The trial court gave judgment for plaintiff, ordering refund as prayed.

On appeal, the Colorado Supreme Court reversed the judgment, saying at pages 529-30:

> "Was the voluntary payment of a 'gap tax' to the State of Colorado, after receipt of notice to pay same from the state, such an erroneous payment of the tax, under the facts herein presented and under applicable Colorado statutes, as to permit or require a refund or recovery upon proper claim?
>
> "This question is answered in the negative. Colorado has no statute which expressly permits such a refund. . . . The fact that plaintiff here did not pay until notified to do so, or paid by mistake, or by what proved to have been a mistake, or paid under a factual misrepresentation, makes no difference. Said Sec. 43 reads in part: 'When any amount of said tax HAS BEEN PAID ERRONEOUSLY * * *, it shall be lawful * * * 'to refund it'. (Emphasis added.) *Clearly, Newton's tax was not 'paid erroneously' at the time it was paid.*" (Capitals indicate italics by court; italics ours.)

As to the construction of the word "erroneous", the California Supreme Court in *Kelshaw v. Superior Court,* 137 Cal. App. 181-192 (1934), came to the same conclusion, saying:

> *"Since upon the face of the record it appears that the amount of inheritance tax was the exact amount provided for in the order fixing the amount of tax to be paid, the conclusion necessarily follows that*

> *there could have been no amount 'erroneously paid'* within the meaning of said subdivision." (Our italics.)

Would then the statutory procedure be available to Appellant *now,* if it should *after* Captain Hunter's determination, pay the tax voluntarily, file a claim and sue for its recovery?

Under the cases, we submit that Appellant can *not* recover under such statute, even when payment is made *after* the determination of the offset.

There can be no question, as noted, that if Appellant were *now* to pay the tax in full to the tax collector of Appellee County, it could not subsequently claim that its collection was *"erroneous".* But what would be the situation as to a refund as *"illegally"* collected taxes *at this time?*

To constitute an "illegal" collection, it is not necessary for the tax, itself, to be illegal. Thus, where a Tax Collector demands from A, payment of a valid tax of B's, in order to release A's property from a lien for B's tax, the tax is "illegally" *collected* from A and refundable to him (*Evans v. County of San Joaquin,* 67 Cal. App. 2d 452, 455-6 [1945]).

However, in this case, not only is the tax itself *valid, but the Tax Collector, under California law, is under a duty to collect the same.* While it is true that the "deduction" or offset authorized by paramount Federal statute is in a larger amount, as we have already seen, there is no *administrative* or judicial mode provided by *state* statute by which such "deduction" may be established and the duties of the Tax Collector changed accordingly.

On the other hand, if, as Appellant contends it should do, the Federal District Court declares Captain Hunter's determination as to the Federal deduction to be valid and subsisting, and the Tax Collector thereafter attempts to collect the valid tax against Appellant, despite the larger Federal offset, Appellant would be entitled, under the provisions of Title 28, U. S. C. Sections 2201 and 2202, to appropriate injunction, restraining him from attempting so to do.

The Tax Refund Statute of the state does not, therefore, furnish any adequate relief on the facts of this case.

But perhaps equally important is the underlying principle in the California cases that *the ground of "error" or "illegality" must be one running to the person claiming the refund or bringing the suit.* In this case, existence of the *federal "deduction" is not occasioned by any act of Appellant. It flows from the subsidies* previously made to Appellee County *by the United States.*

Such situation has never been contemplated in California as one affording the basis for refund of either an "illegal" or "erroneous" tax. The intent of the California Refund Statute (R. & T. C. 5096-5097) is clearly set forth in Sec. 5098 as follows:

> "If any action is brought under this Article by *any other person than the person who paid the tax,* his guardian, executor or administrator, *judgment shall not be rendered for the plaintiff."* (Our italics.)

Illustrative of this well established California policy is *Easton v. County of Alameda,* 9 Cal. 2d 301 (1937), in which the court said at pages 303-4:

> *"These changes show a legislative intention to allow tax refunds only to those persons who pay the taxes*

claimed to have been erroneously assessed. The statute operates to benefit 'all persons who pay taxes they are not legally bound to pay'. . . . but does not allow a recovery by a property owner whose taxes have been paid by someone else under a contract to do so. *In that case, the property owner has parted with nothing and he has no valid claim for a refund."* (Our italics.)

E. Extraordinary Remedies of Mandate, Certiorari or Injunction, Are Not Available to Appellant in the State Courts on Facts of This Case.

It is fundamental that in California, certiorari only lies to determine the exercise of jurisdiction of an inferior tribunal "exercising judicial functions" (Cal. C. C. P. 1068). *Certiorari could not be available to Appellant herein, simply because there are no "judicial functions" involved.*

While broader in scope, *mandate* by California statute (Cal. C. C. P. 1085) is granted only to compel performance of "an act which the law specifically enjoins as a duty resulting from an *office, trust,* or *station."* As already pointed out, no California statute enjoins upon anyone a duty to give effect to the Federal "deduction", credit or offset here involved. Neither does the Federal act itself purport so to do.

Originally, the matter might seem to have been of more doubt as to the use of *injunction.* It is a primarily negative remedy, not an affirmative one, as is the case with mandate. Injunction does *not* lie in California to restrain collection of a *state* tax, basically for the same reasons that it does not in the Federal courts, to wit: existence of a believed adequate remedy by statutory protest or tax refund claim procedure, previously discussed.

However, under the facts of this case, there are two definite and clear reasons why such remedy does *not* lie in the state courts.

First, there is no mode provided for establishing in a state court proceeding, the existence of the Federal "deduction", credit or offset to the otherwise valid statute. As was held by this court in *Sunset Oil Co. v. State of California* (*supra,* p. 15), so to do would be, in effect, an action to sue the state without its consent.

Secondly, if there were still any doubt on the subject, Appellee is now *estopped* from raising the same in this litigation. When it sued Appellant in the state courts for the full amount of its claimed tax, without consideration in any regard of the Federal determined "deduction" therefrom, *on Appellee's motion, the state court struck Appellant's attempted use of injunctive relief, without leave to amend, on the ground that such remedy was not open to Appellant in the state courts.*

Having thus urged on the state court its lack of jurisdiction to enjoin collection of the tax, here in question, based solely on the Federal offsetting "deduction" thereto, Appellee County certainly cannot now urge on this court that such remedy does exist in the state court, and that, therefore, there is no jurisdiction in the District Court below.

III.

On Facts Here, Propriety of Relief Sought Is Clear Under the Supreme Court Decision in Hillsborough Township v. Cromwell.

In essence, the controlling decision here, as previously indicated, is *Hillsborough Township v. Cromwell,* 326 U. S. 620 (1946). In that case, a unanimous Supreme Court held that the District Court had *correctly* taken jurisdiction of the suit before it under the Declaratory Judgment Act.

The contention had been made by Mrs. Cromwell that assessment of her intangible personal property, *in strict accordance with the New Jersey law,* was, nevertheless, *void* under the Fourteenth Amendment, *because the Township had not assessed any other property of the same class.* As the United States Supreme Court, for many years, had held (*Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 445-7) the Fourteenth Amendment guarantees the taxpayer "the right to equal treatment" in the assessment and levy of state property taxes.

However, the New Jersey courts refused to recognize and apply this "Sioux City Bridge Rule". For this reason, Mrs. Cromwell, being without state remedy in New Jersey, had sought exercise of Federal jurisdiction under the Declaratory Judgment Act. The Township argued, however, that in 1933, the New Jersey courts had expressly altered their view, and had adopted the Sioux City Bridge Rule. They claimed, therefore, the taxpayer had an adequate remedy in the state courts.

The District Court, holding to the contrary, took jurisdiction and found the New Jersey *assessment to, and tax on,* Mrs. Cromwell to be *"null* and *void",* although it was able to do so on *separate* grounds of violation of *state* statute.

In affirming such exercise of jurisdiction, the United States Supreme Court, discussed the New Jersey decision claimed to have adopted the Sioux City Bridge Rule, pointing out that there was a question as to its applicability in the case before it. It continued at page 625:

> "In any event, *there is such uncertainty concerning the New Jersey remedy as to make it speculative* (*Wallace v. Hines,* 253 U. S. 66, 68; 40 S. Ct. 435, 436; 64 L. Ed. 782) whether the State afford full protection to the federal rights. . . . *Accordingly we conclude that there was such uncertainty surrounding the adequacy of the state remedy as to justify the District Court in retaining jurisdiction of the cause."* (Our italics.)

Conclusion.

It is clear from the foregoing that the District Court below had Federal jurisdiction over this proceeding as a case arising "under the laws of the United States", Title 28 U. S. C., section 1331. The Federal "law" is, of course, the Federal "deduction" from a State tax provided by the 1956 Amendment to Section 408 of the National Housing Act.

Whether Appellant is also entitled, in enforcement of such Federal "deduction" to the remedy granted, under the Federal Declaratory Judgment Act, in view of the "policy" of the Federal courts in this regard, depends

solely upon whether it is "certain" that Appellant has available to it, in the California courts, an *equally plain, speedy* and *efficient* remedy for enforcement of its rights under such Federal statute.

On this second question, the District Court Judge seems to have been confused, both as to the nature of the suit before him, and what constitutes a showing of *"certainty"* as to an available state remedy or remedies.

The judgment of dismissal was frankly rendered without citation to the court of any claim of precedent directly applicable to Appellant's situation here. If, as the Supreme Court has said, *there is reasonable "uncertainty" as to "adequacy of the state remedy" here, then there is shown the need for interposition by the Federal court* through *declaration* of the rights of the parties and *enforcement* thereof, when such have been determined.

Under the Cromwell and similar cases, the suit here was properly instituted under the Declaratory Judgment Act. On a record showing no *clear* remedy available to it in the state courts, judgment of dismissal entered below was erroneous and should be reversed.

We, therefore, submit that this proceeding should be remanded to the District Court, with leave to Appellees to file such answer, or such other pleadings, which they may desire, and thereafter, for the District Court to determine the controversy on its merits, in accordance with the law and evidence, all as provided in 28 U. S. C. 2201-2202.

Respectfully submitted,

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APPENDIX.

A. PERTINENT FEDERAL STATUTES.

1. *Jurisdiction of District Court.*

Title 28 U. S. C. A. (1957 ed.) reads as follows:

Section 1331. Federal question; amount in controversy.

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Section 1341. Taxes by States.

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Section 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

2. *Jurisdiction of Circuit Court of Appeals.*

Title 28 U. S. C. A. (1957 ed.) reads as follows:

Section 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Section 1292. Interlocutory decisions.

The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

3. *Federal Statute as to Which Declaratory Judgment Is Sought.*

Public Law 1020, August 7, 1956, 70 Stat. 1109, 1110 section 511 (see note, 42 U. S. C. 1594, 1957 ed.), reads as follows:

Sec. 511. Section 408 of the Housing Amendments of 1955 is amended by adding at the end thereof the following: "Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII: Provided, That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other service or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property: *And provided further,* That the provisions of this section shall not apply to properties leased pursuant to the provisions of section 805 of the National Housing Act as amended on or after August 11, 1955, which properties shall be exempt from State or local taxes or assessments."

B. PERTINENT CALIFORNIA STATUTES.

1. *Medium of Payment of Taxes.*

California Revenue and Taxation Code, Deering, 1952, reads as follows:

Section 2501. Medium. Taxes shall be paid only in the mediums permitted by this chapter.

Section 2502. Legal tender, etc. Taxes may be paid in legal tender or in money receivable in payment of taxes by the United States.

Section 2511. County warrants. By resolution of the board of supervisors passed by a four-fifths vote, any county warrant for a particular fiscal year may be received in payment of taxes for the same fiscal year levied by the county issuing the warrants if the amount of the warrant does not exceed the amount of taxes being paid. If registered, warrants shall be received only in the order of registration.

2. *Delinquent Penalty on, and Enforcement of, Unsecured Personal Property Taxes.*

Revenue and Taxation Code, Deering 1952 reads as follows:

Section 2914. Collection of taxes by seizure and sale: Property subject to.

Taxes due on unsecured property may be collected by seizure and sale of any of the following property belonging or assessed to the assessee:

(a) Personal property.

(b) Improvements.

(c) Possessory interest.

Section 2922. Time of delinquency: Penalty: Delinquent date falling on Saturday.

Taxes on the unsecured roll if unpaid are delinquent August 31st at 5 p.m., regardless of when the property is discovered and assessed, and thereafter a delinquent penalty of 8 percent attaches to them; provided, that taxes transferred to the unsecured roll under Section 2921.5 of this code shall not be subject to such 8 percent penalty, except where such taxes carried delinquent penalty on the "secured roll" at time the real estate involved was acquired by a political subdivision. If August 31st falls on Saturday, the time of delinquency is 5 p.m. on the next business day.

Section 2916. Notice of sale: Manner of giving notice. Notice when sale continued.

Notice of the time and place of sale shall be given at least one week before the sale by publication in a newspaper in the county, or by posting in three public places. In the event that it is necessary to continue the sale to a later date, notice shall be given as provided above.

Section 2917. Conduct of sale: Amount of property to be sold: What costs include: Tax payment to include costs.

The sale shall be at public auction. A sufficient amount of the property shall be sold to pay the taxes, penalties, and costs.

Costs include but are not limited to:

(a) The costs of advertising.

(b) The same mileage and keeper's fees as allowed by law to the sheriff for seizing and keeping property under attachment.

(c) A fee of not exceeding three dollars ($3) for each seizure and sale, which may be charged by the official making the seizure and sale.

Whenever any of the foregoing costs have been incurred by the county any payment of taxes made thereafter shall include the amount of such costs.

Section 2918. Vesting of title in purchaser.

On payment of the price bid for property sold, the delivery of the property with a bill of sale vests title in the purchaser.

Section 3003. Suit for collection where lien insufficient security.

Where delinquent taxes or assessment are not a lien on real property sufficient, in the judgment of the assessor or the board of supervisors, to secure the payment of the taxes or assessments, the county may sue in its own name for the recovery of the delinquent taxes or assessments, with penalties and costs.

Section 3004. Evidentiary effect of certified copy of entry. In any suit for taxes the roll, or a duly certified copy of any entry, showing the assessee, the property, and unpaid taxes or assessments, is prima facie evidence of the plaintiff's right to recover.

3. *California Declaratory Relief Statute.*

California Code of Civil Procedure, Deering, 1952, reads as follows:

Section 1060. To Ascertain Status or Construe Writing. Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another,

or in respect to, in, over or upon property, or with respect to the location of the natural channel of a water course, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

4. *California Tax Cancellation Statute.*

California Revenue and Taxation Code, Deering, 1952 reads as follows:

Section 4986. Procedure for cancellation.

All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged:

(a) More than once.

(b) Erroneously or illegally.

(c) On a portion of an assessment in excess of the cash value of the property by reason of the assessor's clerical error.

(d) On improvement when the improvements did not exist on the lien date.

(e) On property acquired after the lien date by the State or by any county, city, school district or other political subdivision and because of this public ownership not subject to sale for delinquent taxes, and on property annexed after the lien date by the city owning it.

(f) On property acquired after the lien date by the United States of America if such property upon such acquisition becomes exempt from taxation under the laws of the United States.

(g) On personal property or improvements assessed as a lien against real property acquired after the lien date by the United States of America, the State or by any county, city, school district or other political subdivision which because of the public ownership is not subject to sale for delinquent taxes.

5. *California Tax Protest Statute.*

California Revenue and Taxation Code, Deering, 1952, reads as follows:

Section 5136. Payment Under Protest. After taxes are payable, any property owner may pay the taxes on his property under protest. A payment under protest is not a voluntary payment.

Section 5137. Contents of Protest. The protest shall be in writing, specifying:

(a) Whether the whole assessment is claimed to be void or, if only in part, what portion.

(b) The grounds on which the claim is founded.

Section 5138. Court Action. Within six months after the payment, an action may be brought against a county or a city in the superior court to recover the taxes paid under protest.

If all or any portion of the taxes paid under protest and sought to be recovered were collected by officers of the county for a city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and a city such actions may be joined in one complaint.

Any city for which county officers collect taxes may provide for the defense by counsel for the county of actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such action, or the city may provide that such actions shall be defended by its own counsel.

Section 5139. Conditions. The action may be brought only:

(a) As to the portion of the assessment claimed to be void.

(b) On the grounds specified in the protest.

(c) By the owner, his guardian, executor, or administrator.

Section 5141. Judgment for plaintiff. If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void. In such event but only where taxes are paid after the effective date of this act, the plaintiff is entitled to interest on the taxes for which

recovery is allowed at the rate of 5 percentum per annum from the date of payment under protest to the date of entry of judgment, and such accrued interest shall be included in the judgment. The taxes paid on so much of the assessment as is not found to be void shall constitute valid taxes which, if paid after delinquency shall carry penalties, interest and costs.

Section 5142. Recovery of penalties, interest and costs. Where the taxes sought to be recovered have been paid after delinquency, the amount of penalties, interest or costs recoverable in actions brought under this article shall be computed only on the taxes recovered.

6. *California Tax Refund Statute.*

California Revenue and Taxation Code, Deering 1952 reads as follows:

Section 5096. Refunds permissible.

On order of the board of supervisors, any taxes paid before or after delinquency shall be refunded if they were:

(a) Paid more than once.

(b) Erroneously or illegally collected.

(c) Paid on an assessment in excess of the cash value of the property by reason of the assessor's clerical error.

(d) Paid on as assessment of improvements when the improvements did not exist on the lien date.

Section 5097. Conditions. No order for a refund under this article shall be made except on a claim:

(a) Verified by the person who paid the tax, his guardian, executor, or administrator.

(b) Filed within three years after making of the payment sought to be refunded.

Section 5098. Court actions.

If an action is brought under this article by any person other than the person who paid the tax, his guardian, executor, or administrator, judgment shall not be rendered for the plaintiff.

Section 5103. Court action authorized.

If the board of supervisors rejects a claim for refund in whole or in part, the person who paid the taxes, his guardian, executor, or administrator may within six months after such rejection commence an action in the superior court against the county or a city to recover the taxes which the board of supervisors or the city council have refused to refund.

If all or any portion of the taxes sought to be recovered were collected by officers of the county for a city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and a city such actions may be joined in one complaint.

Any city for which county officers collect taxes may provide for the defense by counsel for the county of actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such actions, or the city may provide that such actions shall be defended by its own counsel.

Section 5104. Claim for refund required.

No action shall be commenced or maintained under this article unless a claim for refund shall have been filed in compliance with the provisions of this article, and

no recovery of taxes shall be allowed in any such action upon a ground not asserted in the claim for refund.

Section 5105. Interest.

In any action in which recovery of taxes is allowed by the court, the plaintiff is entitled to interest on the taxes for which recovery is allowed at the rate of 5 percentum per annum from the date of the filing of the claim for refund to the date of entry of judgment, and such accrued interest shall be included in the judgment. This section shall not apply to taxes paid before the effective date of this act.

7. *Pertinent California Statutes referrable to Writ of Review.*

California Code of Civil Procedure, Deering, 1952 reads as follows:

Section 1067. Writ of Review defined.

The writ of certiorari may be denominated the writ of review.

Section 1068. When and by what courts granted.

A writ of review may be granted by any court, except a municipal or justice court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.

8. *Pertinent California Statutes Referrable to Mandate.*

California Code of Civil Procedure, Deering 1952 reads as follows:

Section 1084. Mandate defined.

The writ of mandamus may be denominated the writ of mandate.

Section 1085. When and by what court issued.

It may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law especially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

9. *Pertinent California Statutes Referrable to Injunction.*

California Code of Civil Procedure, Deering 1952 reads as follows:

Section 525. Injunction defined: Who may grant.

An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court.

Section 526. Cases in which injunction may or may not be granted.

An injunction may be granted in the following cases:

* * * * * * * * *

2. When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action;

* * * * * * * * *

An injunction cannot be granted:

* * * * * * * * *

1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings:

* * * * * * * * *

4. To prevent the execution of a public statute by officers of the law for the public benefit;